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Supreme Court of the United States

October Term, 1974

No. 73-1046

CASPER W. WEINBERGER,
Secretary of Health, Education and Welfare,

Appellant,

—v.—

SANTIAGO DIAZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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CASPER W. WEINBERGER, SECRETARY OF HEALTH, EDUCATION AND WELFARE,

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On Appeal from the United States District Court for the Southern District of Florida

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

The American Civil Liberties Union files this brief pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Both parties have consented to the filing of this brief. Copies of the consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS

The American Civil Liberties Union is a nationwide non-partisan organization of over 250,000 members devoted solely to the protection of the liberties safeguarded by the Bill of Rights. In its fifty-four year existence the ACLU has been particularly concerned with the right of aliens to enjoy the full protection of our Constitution. The ACLU has participated in numerous cases in this and other courts to challenge deprivations imposed upon non-citizens. The Union is also deeply concerned with laws that impose invidious discriminations upon distinct classes in our society, and believes that such invidious discriminations are no less violative of the Constitution when imposed by the United States than when imposed by the individual states. For these reasons we file this brief to urge affirmance of the judgment of the District Court, 361 F.Supp.1.

ARGUMENT

I.

The Discriminatory Treatment of Aliens with Respect to Eligibility for Enrollment in the Supplemental Medical Insurance Plan Is Clearly Violative of the Fifth Amendment's Guarantee of Due Process of Law.

In Graham v. Richardson, 403 U.S. 365 (1971), this Court held that the discriminatory treatment of aliens with respect to eligibility for state public assistance,

specifically a requirement of durational residence that was not imposed on citizens, was violative of the Fourteenth Amendment's guarantee of equal protection of the laws. Likewise, in Sugarman v. Dougall, 413 U.S. 634 (1973), and In re Griffiths, 413 U.S. 717 (1973), it held that the states could not constitutionally bar resident aliens from public employment or from admission to the bar. As in Bolling v. Sharpe, 347 U.S. 497, 500 (1953), "[i]t would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." If a classification is invalid under the equal protection clause of the Fourteenth Amendment, it is also inconsistent with the due process requirements of the Fifth Amendment. Johnson v. Robison, ___U.S.___, 94 S. Ct. 1160, 1164 n. 4 (1974). If the states cannot constitutionally discriminate against aliens with respect to eligibility for public assistance by imposing durational residence requirements that were not imposed on citizens, the federal government cannot do so either.

But this is precisely what the government is arguing in seeking to overturn the judgment of the District Court in the case at bar. Heedless of this Court's clear pronouncement it has "now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or a 'privilege,'" Graham v. Richardson, supra, at p. 374, the government argues that its "plenary power over immigration

and naturalization" entitles it to treat the receipt of supplemental medical insurance benefits by aliens as a "privilege" somehow related to "the conditions under which aliens are to be permitted to enter and remain in this country," and to require that an alien demonstrate "some substantial and enduring connection with the United States" in order to receive this benefit. This being so, the government reasons, the discriminatory treatment of aliens with respect to eligibility for a social welfare benefit is constitutional when practiced by the federal government, although similar discriminatory treatment would be unconstitutional when practiced by the states.

In support of this contention the government further argues that classifications based on alienage when made by the federal government, as opposed to the states, are not inherently suspect, so that they are not subject to the strict scrutiny of the compelling governmental interest standard, but may be upheld if they satisfy the less exacting rational basis standard. The District Court found it unnecessary to decide whether the discrimination effected here should be evaluated under the compelling governmental interest standard or the rational basis standard, since it found that no rational basis whatsoever for such discrimination could be shown. While we would agree that the discrimination here cannot be sustained under the rational basis standard, we believe that it is particularly important for this Court to

make clear that classifications on the basis of alienage are no less inherently suspect when made by the federal government than when made by the states, and that such classifications are in all circumstances to be subject to the strict scrutiny of the compelling governmental interest standard, as a number of lower federal courts have held. See e.g., Mow Sun Wong v. Hampton, ___F.2d ___, No. 72-1079 (9th Cir. 1974), cert. granted sub.nom. Hampton v. Mow Sun Wong, No. 73-1956, this Term; Jalil v. Hampton, 460 F.2d 923 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972); Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D.P.R. 1974).

The reason that classifications on the basis of alienage are inherently suspect goes to the nature of the classification and has nothing to do with whether it is made by the federal government or by the states. As this Court stated in Graham v. Richardson, supra, at p. 372:

> But the Court's decisions have established that classifications based on alienage, like those based on nationality or race are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority ... for whom such heightened judicial solicitude is appropriate.

They are no less a 'discrete and insular'

minority when it is the federal government that is making the classification. The difference between classification by the states and by the federal government in no sense can relate to the suspect nature of the classification. Its relevance, if at all, appears only with respect to the compelling nature of the interest that is purportedly advanced by the classification, that is, the federal government's classification is tested by whether it advances a compelling federal interest. C.f. Nielson v. Secretary of Treasury, 424 F.2d 833 (D.C. Cir. 1970). As was observed in Jalil v. Hampton, supra, at p. 929, "The federal government has interests different from those applicable to the states, but nonetheless, it must demonstrate that its interest justify the discrimination against aliens." Or, as the Court stated in Ramos v. United States Civil Service Commission, supra, at p. 366:

> We conclude that Congress itself, when legislating generally on matters not related to the furtherance of its naturalization responsibilities, may not single out aliens for discriminatory treatment forbidden to the states. Any other result would lead to a peculiar hierarchy of rules, in which the federal government would enjoy a license to engage in practices condemned by the courts as unfair and discriminatory when done by the states.

This Court should make it clear that classifications on the basis of alienage when made by the federal government, no less than when made by the states, are "inherently suspect" and must be subject to the close judicial scrutiny of the compelling governmental interest standard.

The District Court considered all possible justifications for the discriminatory treatment of aliens with respect to eligibility for supplemental medical insurance under the less restrictive rational basis test and found them wanting. The sole basis for the discriminatory treatment that the government now appears to be advancing is that it was "rational" for the Congress to impose the five year durational residence requirement because this would insure that the alien receiving such benefits had a "substantial and enduring connection with the United States," and therefore, was a proper recipient of this "privilege of citizenship." The government also argues that the rationality of social welfare legislation is subject to "limited judicial scrutiny," a proposition that is clearly untenable when the denial of benefits to a particular group of persons otherwise in need of the benefit is not reasonably related to the accomplishment of a legitimate governmental interest. Jimenez v. Weinberger, ___U.S. ___, 94 S. Ct. 2496 (1974). There is no correlation whatsoever, even under the rational basis standard, between an alien's "substantial and enduring connection" with the United States and his

need for supplemental medical insurance benefits. In short the government, when it talks about the "unique legal status" of aliens, is saying nothing more than that the receipt of welfare benefits by aliens from the federal government is a "privilege," to be subject to any conditions that the government wishes to impose. Such reasoning was thoroughly rejected by this Court in Graham v. Richardson, supra, and the government has not shown in any way how the discrimination effected against aliens by the durational residence requirement advances a legitimate, let alone a compelling governmental interest. The discrimination between persons in equal need of the governmental benefit is as irrational as that condemned by this Court in Jiminez v. Weinberger, supra, and its irrationality is invidiously compounded by the fact that it is directed against a "discrete and insular" minority solely because of their status. If the states cannot impose durational residence requirements for welfare benefits on the basis of alienage, and if, as this Court has held, invidious discrimination is prohibited by the Fifth Amendment's due process clause in the same manner as by the Fourteenth Amendment's equal protection clause, Bolling v. Sharpe, supra, Johnson v. Robison, supra, the federal government likewise cannot impose durational residence requirements on the basis of alienage for the welfare benefits it provides.

II.

The Holding of the District Court to the Effect That the "Lawfully Admitted For Permanent Residence" Requirement Is Not Severable from the Durational Residence Requirement Should Be Affirmed, Particularly Since the Exclusion of All Aliens Other Than Those Admitted for Permanent Residence from the Supplemental Medical Insurance Plan Would Raise Serious Constitutional Questions.

The District Court based its holding on the question of non-severability on the fact that the report of the House delegation to the conference committee revealed that unification of the two residency elements was an integral part of the larger compromise necessary to the final passage of the 1965 Medicare Amendments. 361 F. Supp. at 15. The government argues that this was erroneous because the "lawfully admitted" requirement was contained in both bills. As the District Court recognized, "reasonable men might differ" on the question of non-severability. Id. at 15-16. We would submit that in the particular circumstances of this case the holding of the District Court on this score should be affirmed because the exclusion of all aliens other than those admitted for permanent residence from the supplemental medical insurance plan would raise serious constitutional questions.

The exclusion of aliens such as the ap-

pellees Diaz and Clara from the supplemental medical insurance plan solely because they have not been admitted for permanent residence may create invidious discrimination between classes of aliens whose need for the benefit is the same. Cf. Jiminez v. Weinberger, supra. The government argues that the requirement that an alien be "lawfully admitted for permanent residence" is rationally calculated to exclude from eligibility illegal entrants or other potentially long-term residents, such as diplomats and foreign correspondents, who lack a substantial and enduring tie to the United States. If this is the purpose, the exclusion is overbroad because it includes within its sweep aliens like those appellees who are permanently residing in the United States under color of law, but who have been admitted on a basis other than "permanent residence." These aliens are by the terms of their admission entitled to stay indefinitely in the same manner as those admitted for permanent residence, and it is difficult to find a rational basis for the differential treatment of these persons with respect to eligibility for a governmental welfare benefit. These appellees contended below that the "lawfully admitted for permanent residence" requirement was unconstitutional because it created invidious discrimination between classes of aliens, but the District Court found it unnecessary to reach this issue in view of its holding as to non-severability. The serious constitutional questions that would be presented if the "lawfully admitted for permanent residence" requirement were held severable from the durational residence requirement justifies resolving all doubts in favor of the District Court's finding of non-severability.

This is especially so, since Congress would then be free to enact new requirements with respect to eligibility and could then decide whether, as it has not done in more recent welfare legislation, it wanted to limit the benefits only to those aliens who had been admitted for permanent residence. As the District Court noted, 361 F. Supp. at 14 n. 18, the most recent expression of the will of Congress on the issue of the eligibility of aliens for welfare benefits makes special provision for parolees and conditional entrants to insure their eligibility for aid to the aged, blind and disabled. Benefits are made available to an otherwise qualified individual who is "either (i) a citizen or (ii) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provisions of section 203(a)(7) [conditional entry] or section 212(d)(5) [parole] of the Immigration and Nationality Act." 42 U.S.C. § 1382c(a)(1)(B) (Supp. II, 1973)(emphasis added). Such a provision necessarily excludes illegal entrants and diplomats or foreign correspondents, which is supposedly the reason for the "lawfully admitted for per-

manent residence" requirement of the present statute. Congress can then make its wishes more definitively known with respect to the inclusion of "other permanent residents" in the supplemental medical insurance program. It may also take a different view of limiting inclusion to aliens admitted for permanent residence if the durational residence requirement is invalidated. All of these reasons militate in favor of upholding the District Court's ruling on the question of non-severability.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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